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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

To: The Commission

COMMENTS OF NEW PAR

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SUMMARY

The mobile radio services industry has grown tremendously over the past decade ushering in a diverse array of mobile services. Because of the enormous value these new services can contribute to customers, many new entities have entered the mobile radio services market, thereby creating a dynamic, competitive marketplace.

The most beneficial role of regulation in such a marketplace is simply to maintain a level playing field for all participants. Therefore, the Commission should adopt rules having the effect of regulating equivalent mobile services in the same manner.

In particular, New Par supports the Commission's tentative conclusion and the overwhelming majority view of mobile common carrier service providers that the Commission should forbear from requiring commercial mobile service providers, including cellular carriers, to file rate tariffs for services provided to end-users. Moreover, the Commission should clarify certain sections of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") regarding the definition of commercial mobile services. The legislative history indicates Congress inserted the "functionally equivalent" language in

the Budget Act to afford the Commission discretion to reclassify private land mobile services as commercial mobile services, even where the traits of these services do not comport with the literal definition of a commercial mobile service.

New Par disagrees, however, with the Commission's proposal that it should require commercial mobile service providers to provide interconnection to other mobile service providers, regardless of whether they provide commercial or private mobile services. Such a requirement is unnecessary since all mobile carriers can be or will be interconnected through the LEC. In any event, even if such interconnection is required, the Commission should preempt states from regulating the rates thereof and should establish safeguards to address the possibility of degradation of service and other issues.

Additionally, New Par urges the Commission to remove the prohibition on the provision of dispatch service by common carriers so that commercial mobile service providers may compete with private carriage dispatch providers, which will likely lower costs to subscribers and bring incentives to improve service quality.

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Pursuant to Section 1.415(a) of the Commission's rules, 47 C.F.R. § 1.415(a), New Par submits these comments in response to the Notice of Proposed Rule Making ("Notice" or "NPRM") released October 8, 1993 in the above-captioned proceeding.[1]

INTRODUCTION

New Par is a partnership controlled equally by subsidiaries of Cellular Communications, Inc. ("CCI") and

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[1] Notice of Proposed Rulemaking, GN Docket No. 93-252 (released October 8, 1993).

PacTel Corporation ("PacTel"), a wholly owned subsidiary of Pacific Telesis Group. New Par owns or controls the nonwireline cellular licensees in 17 MSAs in Ohio and Michigan, including the licensees in six of the country's top 50 markets.[2] As such, New Par and the licensees it controls will be directly affected by any re-classification of existing mobile service providers.

I. It Is Not in the Public Interest to Differentiate Among Commercial Mobile Service Providers

In the NPRM, the Commission proposes to divide mobile service providers into commercial and private mobile service categories. The NPRM further proposes to subdivide commercial service providers into three categories: (i) common carrier mobile services; (ii) PCS services; and (iii) private mobile services. New Par submits that this subdivision is unnecessary and inconsistent with the 1993 Budget Act amendments to the Communications Act ("Act").

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[2] The New Par markets are Akron, Canton, Cincinnati, Cleveland, Columbus, Dayton, Detroit, Flint, Grand Rapids, Hamilton-Middletown, Lansing-East Lansing, Lima, Lorain-Elyria, Mansfield, Saginaw-Bay City-Midland, Springfield, and Toledo. New Par also owns the nonwireline licensee (one of which is an interim licensee) in four Ohio RSAs . Additionally, New Par holds a non-controlling interest in and manages the Muskegon nonwireline MSA system.

In fashioning a regulatory scheme for parity of treatment among mobile service providers, the Commission should not adopt rules that would frustrate competition among mobile services. Rather, this new regulatory regime must maintain a level playing field among all mobile service providers.

The NPRM tentatively concludes that Section 332(c)(1) of the Act empowers it to regulate different types of commercial mobile service providers differently. The Commission cites to the Budget Act Conference Report wherein Congress stated that "the purpose of [Section 332(c)(1)] is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services."[3] Accordingly, the Commission proposes to classify PCS and certain other unspecified mobile service providers differently.

The Conference Report explains, however, that the Commission should engage in such disparate treatment only where specifically necessary to ensure that all functionally similar service providers are regulated similarly.[4] Current market conditions show no indica-

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[3] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report").

[4] Id.

tions that any one commercial mobile service provider will have market power over any other provider. Each commercial mobile service will allow users to free themselves from being tied to fixed locations in order to originate or receive voice and data transmissions; these services differ only in terms of their technical design. These services include cellular, PCS, SMR and enhanced (or wide-area) SMR, mobile satellite, and advanced messaging services licensed or proposed in the 220-222 and 900 MHz bands, among others. Thus, within the general ambit of "commercial mobile services" will be numerous competing technologies, services and service providers jostling for market share.

Consequently, there will be increased competition between commercial mobile service providers. Differential regulatory treatment among these carriers would essentially create artificial market forces that hinder the competitive push and shove of the marketplace. Competitors would no longer be rewarded for meeting real market demands. Instead, services not meeting consumer needs may remain on the market due to favorable regulation, while other services are not fully developed despite customer demand. Any distinction between PCS, cellular, paging or other types of services provided by

these and other industries would be wholly arbitrary. Consumers choose from among various wireless communications services based upon several factors, including price and functionality. In a competitive marketplace, differential regulation of commercial mobile services is unwarranted and does not meet the public interest test that is defined in the Act.[5]

Further, before modifying the application of Title II regulations to a particular service or service provider, the Commission must meet a three-part test.

> In prescribing or amending any such regulation, the Commission may . . . specify any provision [other than Sections 201, 202, or 208 as long as it] determines that (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest.[6]

Thus, the Commission must make the determinations required by statute before holding a certain provision inapplicable to a particular commercial mobile service or individual provider of such service. In order to treat

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[5] 47 U.S.C. § 332(c)(1)(A)(iii)(1993).

[6] 47 U.S.C. § 332(c)(1)(A)(1993).

commercial mobile service providers differently, the Commission would have to determine that different types of forbearance are necessary. As discussed above, however, there is no basis to differentiate among the various types of mobile service providers. These carriers will all compete for the same customers through the provision of very similar types of services. Competitive pressures and the Section 208 complaint process are sufficient -- as they are with respect to hundreds of interexchange carriers -- to ensure just, reasonable, and non-discriminatory rates and practices and protection of consumers.

II. The "Functional Equivalent" Language of Section 332(d)(3) Must Be Interpreted Consistent with Overall Legislative Intent

Section 332(d)(3) of the Act defines "private mobile service" as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[7] The NPRM solicits comments on the correct interpretation of the phrase "functionally

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[7] 47 U.S.C. § 332(d)(3)(1993)(emphasis added). Commercial mobile service is defined as any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission." 47 U.S.C. § 332(d)(1)(1993).

equivalent." In short, the NPRM states that the phrase can be interpreted to include in the definition of commercial mobile services those functionally similar services that do not meet the literal definition of commercial mobile service -- and thereby expand the category of commercial mobile service providers -- or to limit the definition by excluding those services meeting the literal test but not the functional test. New Par submits that the only interpretation consistent with the overall statutory objective is the former.

As the Commission indicates in the NPRM this interpretation comports better "with the view that functionally similar services should be subject to the same regulatory requirements." NPRM at ¶ 31. Indeed, Congress specifically stated this was one of its primary goals in passing the legislation.[8] The plain meaning of the statute is that there may be three types of services: those meeting the strict definition of "commercial mobile service;" those functionally equivalent to commercial

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[8] See Conference Report at 498 (1993) (Conference Agreement adopting proposed House language with slight modifications to clarify that private land mobile services reclassified as common carrier services are subject to technical requirements comparable to those imposed on similar common carrier services).

mobile services; and all others, which are called private mobile services.

III. The Commission Should Detariff Cellular Carrier Services

New Par concurs with the Commission's proposal to forbear from tariff regulation of the services offered by commercial mobile service providers. The Commission has already found that forbearance of tariffing provisions in Section 203 of the Act for carriers subject to competition furthers competition and is consistent with the public interest.[9]

The cellular industry in and of itself is already competitive with the presence of two facilities-based providers of cellular service in substantially every market and any number of resellers in the larger markets. As the NPRM recognizes, after SMR (particularly enhanced SMR), paging services, mobile satellite services and as many as seven new PCS providers are factored in, it is apparent that the marketplace for mobile voice and

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[9] See, e.g., Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor Second Report and Order, 91 F.C.C. 2d 59 (1982).

data communications services is highly competitive currently and will rapidly become even more competitive.[10]

In this competitive mobile services environment, cellular service rates have declined in real terms since cellular's inception, when adjusted for inflation, despite the hundreds of millions of dollars of investment the industry has made.[11] Additionally, the competitive cellular environment has produced higher quality, new services. All this has occurred in an environment that has been substantially detariffed.[12] Thus, detariffing commercial mobile service providers will not injure consumers since they are protected by competitive market forces.

Section 332(c)(1)(C) directs the Commission to consider whether forbearing from applying certain regulations will "promote competition among providers of com-

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10 See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order GEN Docket No. 90-314 at ¶ 2 (released October 22, 1993)(PCS will raise level of competition in "already competitive segments of the telecommunications industry" (emphasis added)).

11 Cellular Competition: The Charles River Study (1992) (19% decline in rates since 1983 (adjusted for inflation) and 44% decline in cost of accounting and operating a cellular phone over same period).

12 See NPRM at ¶ 63.

mercial mobile services."[13] The Commission only has to look to the experience in the long distance marketplace to see that forbearance from enforcing tariffing regulations promotes competition. In the years that the forbearance policy was applied to nondominant long distance carriers, a market consisting of a few service providers has grown to well over 400 service providers.[14] Most of the smaller long distance carriers would not be where they are today were it not for forbearance. Forbearance will greatly reduce the administrative burdens on carriers and the Commission and will benefit consumers by enabling carriers to respond more rapidly to market demand. This in fact has been the case in both the SMR and cellu-

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13 47 U.S.C. § 332(c)(1)(C)(1993). The NPRM states that the Commission must conduct a public interest analysis regarding the state of competition between commercial mobile service providers and LECs and IXCs prior to forbearance of regulation. See NPRM at ¶ 59. This is not correct. Congress has already defined the relevant market analysis and under Section 332(c)(1)(C) the Commission must review "only competition among providers of commercial mobile services." 47 U.S.C. § 332(c)(1)(C)(1993) (emphasis added). Currently cellular and mobile services are not substitutes for landline service, including interexchange services. Landline local exchange service is simply a separate market from mobile services, as are the interexchange services available through them.

14 Tariff Filing Requirements for Interstate Common Carriers, 7 F.C.C. Rcd. 804, 804 (1992).

lar industries, each of which have provided commercial mobile services in a largely forborne regulatory context.

Finally, as the Commission points out in the NPRM, a customer's right to file a complaint pursuant to Section 208 of the Act[15] has not been abridged and will remain in effect.[16] Thus, consumers will be fully protected upon tariff forbearance for mobile service providers.

IV. The Commission Should Not Order Physical Interconnection Between Commercial Mobile Service Providers and Other Mobile Services

The NPRM asks whether commercial mobile service providers should be required to provide interconnection to their systems for other mobile service providers. It would not be in the public interest at this time to require commercial mobile service providers to provide such interconnection to their networks.

To begin with, such interconnection is unnecessary since mobile service providers should already interconnect through the LEC. Thus, mandated mobile service-to-mobile service interconnection would be redundant. Moreover, mobile service providers do not have the local

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[15] 47 U.S.C. § 208.

[16] See NPRM at ¶ 62.

bottleneck monopoly enjoyed by an LEC. Thus, unlike an LEC's interconnection with cellular and other carriers, mobile service-to-mobile service network interconnections are not necessary to ensure universal connection to the PSTN, and mobile service providers therefore have no ability to deny other mobile service providers access to the PSTN.

Further, to the extent that an entity seeks interconnection with another mobile services provider in lieu of or addition to interconnecting with an LEC, the mobile services provider will have no incentive to deny a reasonable interconnection arrangement between the two parties. Where such interconnection is feasible for both parties, the interconnection will be made. The threshold for such interconnection, however, will vary depending on the system's capacity for interconnections, the technical compatibility of the two systems, and cost. Unlike LECs, mobile service networks will not always have the capacity and compatibility for unlimited interconnections. Thus, mobile service-to-mobile service interconnection should be permitted but not required.

In any event, if the Commission concludes that it should order mobile service-to-mobile service interconnection, the Commission should follow its tentative

conclusions and preempt state authority to regulate such interconnection. First, the Commission should preempt state regulation of the technical aspects of interconnection for intrastate service due to the negative impact that piecemeal state regulation would likely have on the federal goal of efficient interconnection to the interstate network.[17] Second, the Commission should preempt state rate regulation of such interconnection arrangements. The Budget Act amendments preempt state regulation of all rates charged by mobile service providers unless the state obtains specific authority from the Commission to continue such rate regulation. Nothing therein excludes interconnection rates from such preemption. Presuming, therefore, that Congress even intended to extend the interconnection policies to mobile service-to-mobile service scenarios, one must also conclude that

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[17] See NPRM at ¶ 71 ("[P]ermitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network"); See e.g, Atlantic Richfield Co., 3 F.C.C. Rcd. 3089 (where private facilities were interconnected to PSTN via non-LEC facilities, Commission preempted state regulation where federal and state regulation conflicted).

its general preemption of state rate regulation extended just as far.[18]

Finally, the Commission would need to adopt, or at least enable mobile service providers to enact, safeguards to address the potential degradation of service to the mobile service's subscriber base; subsidization of initial capital outlays for system modifications; and liability to interconnecting providers and subscribers for service failures.

V. The Commission Should Allow Common Carriers To Provide Dispatch Service Over Their Facilities

The Commission should amend its rules to permit common carriers to provide dispatch service. First, eliminating the prohibition on common carriers providing dispatch service, will better serve the needs of existing and prospective customers. Many cellular customers also have dispatch needs. For example, New Par has existing cellular customers that desire both cellular and dispatch services. If the Commission were to open the dispatch service marketplace to common carriers, cellular carriers

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[18] Cf. Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 F.C.C. Rcd. 2910, 2912 (1987) (where it is possible to separate interstate and intrastate components, but the Act has provided for Commission oversight, preemption of state regulation is allowed.)

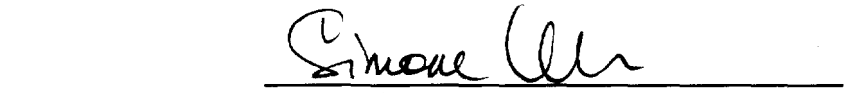
could become full-service providers of mobile communications having the ability to better customize their services to reach more segments of users. Currently, only SMR operators can offer one-stop shopping for both dispatch and commercial mobile services interconnected with the PSTN. This disparate treatment has no foundation under the Budget Act amendments or the policy goals of this rulemaking proceeding.

Second, enabling more entities to participate in offering dispatch services will promote greater competition in the dispatch marketplace. Considering the marginal expenses involved in modifying a cellular carrier's existing network to provide dispatch, cellular carriers could feasibly and quickly enter the dispatch services market and charge competitive rates for dispatch services. Finally, at least with respect to cellular carriers, there is no technical justification for continuing the dispatch service prohibition. The cellular, PCS and other common carrier frequency bands are equally suited for traditional dispatch services. Further, common

carrier subscribers will not suffer degradation in their service because carriers can employ spectrally efficient technologies to avoid interference to existing users.

Respectfully submitted,

NEW PAR



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